ARBITRATION OPINION AND AWARD

IN THE MATTER OF THE ARBITRATION BETWEEN

TIDELANDS OIL PRODUCTION COMPANY

AND

PACE LOCAL 8-675

Grievant: Larry Cross, Electrician

Hearing Held: February 7, 2001

C. Chester Brisco, Arbitrator

APPEARANCES

FOR THE EMPLOYER: Kenneth E. Ristau, Jr., Esq.

FOR THE UNION: Julia Harumi Mass, Esq.

BACKGROUND

The Grievant, Larry Cross, commenced his scheduled six-day paid vacation on Tuesday, December 28, 1999. He was to return to work on Thursday, January 6, 2000. (The vacation spanned Friday, a holiday under the Collective Bargaining Agreement. Saturday and Sunday were his regularly scheduled days off.) While in San Francisco with his family, Mr. Cross became ill and they returned to Southern California on Sunday, January 2, 2000. He attempted to report his illness by phone to his supervisor on Monday but was unable to reach him. The next day, January 4th, he reported his illness to the Human Resources Department, and he visited a doctor who diagnosed pneumonia. Mr. Cross reported for work on Monday, January 10, 2000, with a doctor's Return To Work Order. He received sick leave pay from January 6 to 9, 2000. These facts are undisputed. The Grievant claims that he should have received sick leave pay for January 3, 4, and 5, 2000, instead of vacation pay because his was ill on those days. Resolution of the Grievance turns upon interpretation and application of the Collective Bargaining Agreement.

ISSUES

The parties stipulated to the following statement of the issues:

1. Did the Company violate Joint Exhibit 1 [Collective Bargaining Agreement] when it refused to pay the Grievant sick pay during the period January 3, 4, and 5, 2000, if the Grievant was on scheduled vacation and received vacation pay?
2. If so, what shall be the remedy? If not, the Grievance is dismissed.

PERTINENT CONTRACT LANGUAGE

ARTICLE 6 – VACATIONS

2. The vacation must be taken in one continuous period by each employee entitled thereto, unless otherwise arranged between the employee and the Company. No carryover of vacation shall be allowed into the next or succeeding years except as noted for anniversary vacations and employees unable to take scheduled vacations due to sickness or injury. . . . If it is impossible for an employee to start his vacation in the year due, an employee will be credited with vacation pay and his sick leave will be extended by the same period as the employee's vacation. . . .

ARTICLE 17 – SICK LEAVE

A. All employees shall receive sick leave pay allowance for time lost on any regularly scheduled work day because of sickness or injury for off-the-job disabilities, subject to the following provisions:

Upon the completion of one (1) year of accumulated service, employees will be allowed during that anniversary year one (1) week at full pay and two (2) weeks at half pay provided that payment shall be made only for those scheduled days which the employee would have worked had the disability not occurred.

ARTICLE 27 – WAIVER OF PERFORMANCE

The waiver of performance of any obligations of the Articles of Agreement by either party at any time or for any period shall not be construed as a waiver of the right of such parties to insist at a later date upon full performance of such obligations thereafter occurring.

PERTINENT EMPLOYEE HANDBOOK LANGUAGE

Vacations

Should an employee become hospitalized or suffer a disabling accident while on vacation, the immediate supervisor may reschedule the vacation period.

POSITIONS OF THE PARTIES

The parties submitted well-considered post-hearing briefs which the Arbitrator has studied with care. In the interest of brevity, only the major contentions are outlined below.

Position of the Union

The failure of the Company to pay three days of sick leave claimed by the Grievant violates the Collective Bargaining Agreement, concludes the Union, based upon the following arguments.

> The Company argues that sick leave is not available during vacation because vacation days are not "regularly scheduled work days" once a vacation is scheduled. . . . . A better reading of Article 17 is that "regularly scheduled work days," limits the benefit of sick leave to days on an employee's regular shift as defined in Article 2 ("Hours of Work"), and excludes regularly-scheduled days off. Article 2 defines a "regular work day" by describing the eight (or eight and one-half) hour shift to which an employee is assigned.

The Union contends that this reading is required by the principle of contract construction that gives effect to each contract provision, harmonizing similar terms, and the principle that language enumerating exceptions must be construed as exhaustive. That is, "the parties' ability to specify exceptions to the sick leave benefit, and their failure to create an exception for days previously scheduled as vacation, compels the conclusion that the latter exception was not intended by the parties." The Union also points out that because the purpose of sick leave pay is to protect the income of employees unable to work, it should apply "in all cases where employees are unable to work, as Larry Cross was while he had pneumonia."

In addition, the Union argues that past practice supports its reading of the Collective Bargaining Agreement. Employees have received sick leave pay in lieu of vacation pay when they were injured during a scheduled vacation, and the Company did not bargain with the Union to limit the practice, nor was there any evidence of when the Company's policy documents were distributed to employees. For these reasons the Grievant should receive sick leave pay, not vacation pay, for the dates of January 3, 4 and 5, 2000.

Finally, the Union urges the Arbitrator to discredit the Company's grounds for denying the Grievance because of its inconsistent reasons for its denial. At first, the Company refused to pay because the Grievant's doctor's release showed that he visited the doctor on January 6th and, therefore, no sick leave could be paid prior to that date. Then, when the Grievant submitted a

corrected doctor's release establishing that he was in the doctor's office on January 4th, the Company said that because he was on a scheduled vacation sick leave, he would not be paid unless he was hospitalized or had suffered a disabling accident. Further, there is no coherent description of the policy's requirements, and it is not sanctioned by the Collective Bargaining Agreement.

Position of the Company

The Company contends that it did not violate the Collective Bargaining Agreement when it denied the Grievance, and it points out that the Union has the burden of proving a violation. The Union has not carried its burden, concludes the Company.

Firstly, the language of the Collective Bargaining Agreement clearly states that sick leave pay is designed to compensate employees for loss of pay because of sickness or injury on regularly scheduled work days. A vacation day is not a regularly scheduled work day. Although the Agreement permits a carryover of vacation when an employee is unable to take a vacation due to sickness or injury, it omits providing for sick leave compensation if an employee's vacation is interrupted because of sickness or injury.

Secondly, the Company for many years, as an extra-contractual benefit, has allowed a supervisor to convert vacation pay to sick leave pay when an employee has become hospitalized or has suffered a disabling accident while on vacation. This is spelled out in the Employee Handbook and a similar provision is in the Supervisor's Manual. The language of the Agreement and the Handbook is clear, and attempts by the Union to produce evidence of past practice were not credible.

Thirdly, the Union's evidence of past practice is based largely on hearsay that further serves to undermine its credibility; it should be given little weight. Fourthly, Article 27 of the Collective Bargaining Agreement precludes the Union from establishing a past practice because the Company, as well as the Union, may insist upon full performance under the Agreement "even if they waived that right on a particular occasion." For these reasons, the Company concludes that the Grievance must be denied.

OPINION

The resolution of the Grievance requires interpretation of relevant Collective Bargaining Agreement language and its application to uncontested facts. There is no dispute that Mr. Cross was ill with pneumonia from Monday, January 3, 2000, and that he returned to work on Monday, January 10, 2000, with appropriate medical certification. He was not scheduled to work on Friday through Sunday: December 31, 1999, was a holiday, and January 1 and 2, 2000, were his regularly scheduled days off. His illness, therefore, commenced during his vacation and continued (and no doubt made miserable) his scheduled vacation days of Monday, Tuesday, and Wednesday (January 3rd, 4th, and 5th), days on which he would have been regularly scheduled to work had he not been on vacation. These are the three days that the Union argues should have been paid to him as sick leave and should not have been credited against his vacation allowance.

When arbitrating matters of contract interpretation, it is customary for the Union to bear the burden of production and the risk of non-persuasion; that is, the Union first presents evidence of its prima facie case subject to Company rebuttal and, should the evidence be found in equipoise, it must be held that the Union has not prevailed by the weight of the evidence, the applicable quantum of proof in this matter.

We begin by examining relevant contract language. Article 17, Sick Leave, Paragraph A, limits sick leave pay to "time lost on any regularly scheduled work day because of sickness or injury for off-the-job disabilities. . . ." Article 2, Hours of Work, Paragraph B, specifies that "The regular work day for shift persons shall consist of eight (8) consecutive hours in any twenty-four (24) hour period." The paragraph then defines the various shift hours. Mr. Cross testified, "My normal shift as an electrician is Monday through Friday from 6:00 in the morning until 2:30 in the afternoon." Therefore, Mr. Cross's regular scheduled work days were Monday through Friday, and he worked from 6:00 A.M. until 2:30 P.M. on those days. This language is clear, unambiguous, and cannot be misconstrued by anyone familiar with the ordinary subject matter of Collective Bargaining Agreements. The Union's construction of Article 17 is inapposite.

The vacation provisions are found in Article 6 of the Collective Bargaining Agreement. This Article does not state explicitly that vacation pay shall apply only to regularly scheduled work days, but there is no contention that an employee should receive vacation pay *and* regular pay at the same time (they are mutually exclusive), or that vacation pay should be received for regularly scheduled days off, except for paid holidays. The only possible reading of Article 6 is

that vacation days are paid only for otherwise regularly scheduled work days. Therefore, a scheduled day of vacation is not a scheduled day of work.

The key issue is what benefit applies when an employee on a regularly scheduled vacation becomes ill on a day for which he is receiving vacation pay? The Collective Bargaining Agreement is silent on this question. In the absence of a specific contract provision granting the right to receive sick leave pay for illness occurring during a scheduled vacation, it must be held that the Union has not negotiated such a benefit.[1]

The Employee Handbook, however, provides that "Should an employee become hospitalized or suffer a disabling accident while on vacation, the immediate supervisor may reschedule the vacation period." (There is a parallel provision in the Supervisors Manual, but that benefit and its administration are irrelevant to bargaining unit benefits.) While the language is clear, its permissive nature opens the door to relevant evidence of prior application. The direct evidence is that this policy has been applied in the past only in those instances in which an employee suffered an accident. No examples were produced involving hospitalization. Glen Frietas testified that he suffered a disabling injury to his foot requiring stitches. The Union was not able to supply any credible evidence of employees who became ill during vacation being paid sick leave.

The remaining question concerns how the Company responded during the Grievance Procedure. When Mr. Cross returned to work, he presented a doctor's certificate that showed he visited the Doctor on January 6th. Mr. Cross apparently obtained an impression that if he produced a doctor's certificate that established that he visited his Doctor on January 4th, (which, in fact, he did), he would be paid sick leave for vacation days of January 3rd, 4th, and 5th. He received this impression, he testified, because Supervisor Kelly asked him to verify that he did, indeed, see his doctor on the 4th. (Mr. Cross subsequently obtained a second doctor's certificate, identical to the first, except that it included his visit on January 4th.) [TR 25-27] Mr. Cross did not receive the sick leave pay to which he felt entitled and he filed a grievance.

The first step grievance meeting was attended by Unit Chairman Perry, Union Members Simpson and Devries, Supervisor Bertucci, and Director of Human Resources Cornelison. According to Mr. Perry, in summary, Supervisor Bertucci at first took the position that the

---

[1] See Antoine, ed., The Common Law of the Workplace, § 3.6 *Reserved Rights in the Absence of a Specific Provision* (BNA 1998).

Company would not pay sick leave while Mr. Cross was on vacation, but Bertucci then agreed that if Cross could show he had seen the doctor on January 4th that the Company would pay sick leave "starting on the 4th". [TR 46-49] In a later one-on-one meeting, according to Mr. Perry, Mr. Bertucci refused to honor this agreement when Perry produced the corrected doctor's certificate.

Mr. Devries, who had attended the grievance meeting, testified that "Joe [Bertucci] had made the statement that if we could prove that Larry had gone to the doctor that he would go ahead and pay him." [TR 42] Mr. Devries also testified that he takes notes at grievance meetings and that because this was an important commitment by the Company he would have made a written note of it. His notebook, he said, was at home because he had been called unexpectedly from work to testify, but given the opportunity he would produce the writing. The Arbitrator held the hearing open to afford Mr. Devries the opportunity to provide the evidence, but it was later stipulated that the writing did not exist. The testimony of Mr. Bertucci and Mr. Cornelison was that they did not remember any such promise being made. The conflicting evidence provides ample room for doubt as to what actually occurred at the meeting. The Union bears the burden on this issue, and it must be concluded that it has not prevailed by the weight of the evidence.

CONCLUSIONS

Under ordinary principles of contract construction, the Collective Bargaining Agreement does not admit the interpretation contended by the Union. There is no past practice under Company Policy extending sick leave pay to employees who become ill during their scheduled vacation. The Company did not promise during the grievance negotiations that it would pay the Grievant sick leave for the days claimed.

AWARD

The Company did not violate Joint Exhibit 1 [Collective Bargaining Agreement] when it refused to pay the Grievant sick pay during the period January 3, 4, and 5, 2000, if the Grievant was on scheduled vacation and received vacation pay. The Grievance of Larry Cross is denied.

May 9, 2001

Tustin, California

_____

C. Chester Brisco, Arbitrator